



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 29, 2010

Ms. Josette Flores  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza, 9<sup>th</sup> Floor  
El Paso, Texas 79901

OR2010-16438

Dear Ms. Flores:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 398380.

The City of El Paso (the "city") received a request for all records since January 1, 2004 pertaining to two specified contracts and files relating to a proposed flow control ordinance. You state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. This section provides in part that:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code. § 552.022(a)(3), (16). In this instance, Exhibit B-14 includes information in a contract relating to the expenditure of public funds and Exhibit B-23 consists of an attorney fee bill. Thus, the city must release this information pursuant to subsections 552.022(a)(3) and 552.022(a)(16) unless it is expressly confidential under other law. Although you seek to withhold this information under sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions and do not make information confidential. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the information subject to section 552.022 under section 552.107 or section 552.111. However, the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You indicate the information subject to section 552.022 contains communications between city attorneys and an outside legal counsel that the city hired. You state the communications were intended to be and have remained confidential. Accordingly, the city may withhold the information we have marked in Exhibit B-23 on the basis of the attorney-client privilege under Texas Rule of Evidence 503. However, we find that you have failed to demonstrate that the remaining information in the fee bill in Exhibit B-23 and the contract in Exhibit B-14 consists of or documents confidential communications that were made between privileged parties. Therefore, we conclude that Texas Rule of Evidence 503 is not applicable to the remaining information at issue, and it may not be withheld on this basis.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information may be withheld under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You generally state the remaining information in Exhibit B-23 and the contract in Exhibit B-14 consists of attorney work product that is protected by rule 192.5. Having considered your arguments and reviewed the information at issue, we conclude you have not demonstrated that any of the remaining information subject to section 552.022 consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of litigation. We therefore conclude that the city may not withhold any of the remaining information subject to section 552.022 under Texas Rule of Civil Procedure 192.5. As you raise no further exceptions for the remaining information subject to section 552.022, it must be released.

Next, we consider your argument under section 552.107 of the Government Code for the information not subject to section 552.022. Section 552.107(1) protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. The elements of the privilege under section 552.107 are the same as those for rule 503 outlined above. You represent the remaining information consists of communications between officials and employees of the city, attorneys for the city, and a consultant hired by the city. You state these communications were made in connection with the rendition of legal services to the city. You state the communications were intended to be and remain confidential. Therefore, based on your representations and our review, we conclude the city may generally withhold most of the remaining information under

section 552.107(1) of the Government Code.<sup>1</sup> We note, however, that a portion of Exhibit B-12 consists of a hand-written note. You state Exhibit B-12 consists of an e-mail exchange between city attorneys and officials. However, the hand-written note is not attached to the e-mail at issue. Because the note itself does not indicate, and you have not explained, whether the note was communicated among privileged parties, we find that this hand-written note may not be withheld on the basis of section 552.107(1). Further, we note that one of the e-mail strings in Exhibit B-10 includes a communication with a non-privileged party. If the communication with this non-privileged party, which we have marked, exists separate and apart from the e-mail string in which it appears, then the city may not withhold the communication with the non-privileged party under section 552.107(1).

You generally assert that the remaining information is excepted under section 552.111 of the Government Code. Section 552.111 of the Government Code encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

You generally state the remaining information consists of information developed in the anticipation of litigation. However, upon review, we conclude you have not demonstrated that any of the remaining information consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. We therefore conclude that the city may not withhold any of the remaining information under section 552.111 of the Government Code.

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

In summary, the city may withhold the information we have marked in Exhibit B-23 under Rule 503 of the Texas Rules of Evidence. With the exception of the hand-written note in Exhibit B-12, the city may withhold the remaining information not subject to section 552.022 under section 552.107 of the Government Code; however, to the extent the non-privileged e-mail we have marked in Exhibit B-10 exists separate and apart from the submitted e-mail string, it may not be withheld under section 552.107. The remaining information must be released..

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

NK/em

Ref: ID# 398380

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)